Supreme Court, U.S.
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No. 97-832

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GARY DALE HINES,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
SUSAN J. ORTON, Assistant
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5279
Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether court-appointed defense counsel necessarily labor under a conflict of interest which infringes upon Sixth Amendment guarantees.

2. Whether the fact-intensive process by which Petitioner, who was permitted more than six days to make his decision about whether or not to testify before he ultimately decided to testify, implicated any Fifth or Sixth Amendment rights.

3. Whether the California Supreme Court's interpretation of its state sentence-reduction law, California Penal Code sections 1181, subdivision 7, and 1260, offends capital defendants' Eighth and Fourteenth Amendment rights.

LIST OF PARTIES

Petitioner Gary Dale Hines is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondents are C. A. Terhune, Director, California Department of Corrections, Arthur Calderon, Warden of the California State Prison at San Quentin, and the People of the State of California.

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OPINION AND ORDER BELOW

The opinion of the California Supreme Court, *People* v. *Hines,* 15 Cal.4th 997 (1997), was filed as Appendix A to the petition for writ of certiorari, at pages 1a through 106a. A copy of the orders which denied rehearing and made a short modification of the opinion, reported at 16 Cal.4th 825b (1997), were filed as Petitioner's Appendixes B and C, respectively, to the petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257, subdivision (a). The opinion of the California Supreme Court was filed June 26, 1997, and the order denying Petitioner's timely petition for rehearing was filed on August 20, 1997. The pending petition, filed on November 18, 1997, is thus within 90 days of the denial of rehearing or discretionary review by the state Supreme Court. Accordingly, it comports with the time requirements of rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS

Petitioner is invoking the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the relevant parts of which he has quoted at pages one and two of his petition.

STATEMENT OF THE CASE

On April 20, 1988, after a four-week trial, a jury convicted Petitioner Gary Dale Hines of the September

15, 1986, murders of Kathryn and Donna Roberts, section 187,[1] a mother and her teen-aged daughter. The jury also convicted Petitioner of robbery, section 211; burglary, section 459; grand theft of an automobile, section 487, former subdivision 3; and possession of a firearm by a convicted felon, section 12021. The jury also found true three special circumstances under California's 1978 death penalty laws: (1) that the murders were perpetrated in the commission of a robbery, section 190.2, former subdivision (a)(17)(i); (2) that the murders were perpetrated in the commission of a burglary, section 190.2, former subdivision (a)(17)(vii); and (3) that multiple murders were committed, section 190.2, subdivision (a)(3). In addition, the jury found that Petitioner was armed with a firearm in the commission of the robbery, the burglary, and the two murders, section 12022.5.

On May 12, 1988, after a penalty trial, the jury fixed the penalty at death. On July 7, 1988, the trial court denied Petitioner's automatic motion for modification of the verdict, section 190.4, subdivision (e), and sentenced Petitioner to death.

Petitioner's appeal to the Supreme Court of California was automatic. On June 26, 1997, the California Supreme Court affirmed the judgment, including the sentence of death, in its entirety. *People v. Hines*, 15 Cal.4th 997-1084 (1997), included as Appendix A to the Petition for Certiorari.

STATEMENT OF FACTS

The facts are set out in the published opinion of the California Supreme Court in *People v. Hines*, 15 Cal.4th 997, at 1015-1019.

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1. All code section citations will refer to the California Penal Code sections unless otherwise stated.

Respondent must also point out that most of the representations set forth in Petitioner's statement of facts, Petition for Certiorari, pages three and four, consist only of the discredited account of the murders which Petitioner presented to the jury during the defense case.

A. Guilt Phase-Prosecution's Case

In 1985, Lawrence "Bud" Roberts, his wife Kathryn, and their daughters, Donna and Michelle, moved from Grande Ronde, in Oregon, to the North Highlands area of Sacramento County, California. In the summer of 1986, when Donna was 15 years old and Michelle was 10, the family moved from North Highlands to a house at 4840 Priscilla Lane in South Sacramento.

At that time, Rebecca Palanuk, a friend of Donna Roberts from Grand Ronde, stayed with the Roberts family for three weeks, and helped them move to their new home. Palanuk had a brief romance with Petitioner Gary Dale Hines. Petitioner had visited Palanuk once at the victims' North Highlands house and saw her three times at the South Sacramento house. When Petitioner noticed Bud Roberts's pink fiberglass replica of a 1923 Ford Model-T roadster in the garage, he told Palanuk that he was going to "get" the roadster "one way or another." After Petitioner spent a night in a motel with Palanuk and Donna Roberts, Palanuk told Petitioner she did not want to see him again. About the same time, Petitioner's probation officer told him not to see Palanuk.

In September 1986, at the request of a mutual friend, Viola DuCoing and Justin Comer gave Petitioner and two companions, Jamie Pyle and Mary Anne Poindexter, a ride from Auburn to Sacramento. During the drive, DuCoing, Comer, Pyle, and Poindexter all heard Petitioner say that the next time he went to court, he would go in a pink roadster. Petitioner also told an

acquaintance, Terri Wilson, that he was going to "repossess" a "real nice roadster" from "a friend."

Jamie Pyle spent the night of September 14, 1986, at the Sacramento home of Steve Tabor. Also present were Petitioner and several other people. During the evening, Petitioner played with a pearl-handled pistol. Early the next morning (September 15), Pyle and two others drove Petitioner and Randal Houseman to a location in South Sacramento that was unfamiliar to Pyle, and dropped them off.

About 10:30 that morning, Donna Roberts called Jiy Williams, a friend who had lived next door to the Roberts family when they lived in Grand Ronde, Oregon. According to Williams, Donna sounded "[k]ind of nervous, scared." Williams heard two and possibly three male voices in the background; near the end of the conversation, he heard one of the voices tell Donna, "Hurry up and get off the phone." Williams asked who was present, and Donna told him.

That afternoon, Michelle Roberts came crying to the home of a neighbor, Steven Mejia, and told him that she thought her mother had been killed. Mejia called the police. At the Roberts home, the police found the bodies of Kathryn and Donna Roberts. Both victims had suffered multiple gunshot wounds. Donna had been blindfolded, her mouth gagged with socks, and her hands and feet bound with shoestrings and a telephone cord. The master bedroom had been ransacked. Missing from the home were the pink roadster, the purses of Kathryn and Donna, and several rifles and pistols kept in a gun case. In addition, a videocassette recorder (VCR) had been moved from the living room to the garage.

Nine separate witnesses saw two White males driving Bud Roberts's pink roadster through the streets of Sacramento between noon and 1:30 p.m. on September 15, the day that Donna and Kathryn Roberts were killed. Most of the witnesses testified that the men were in their

late teens or early twenties. (Petitioner was twenty years old at the time; Houseman was sixteen.) Four witnesses (Jeffrey Doyle, George Perez, Lynette Douke, and James Quirk) identified Randal Houseman as the passenger in the car. Another witness (William Johnson) identified Petitioner as the driver.

That afternoon, Petitioner and Houseman drove the roadster to Steve Tabor's home, arriving about 2:00 p.m. A neighbor of Tabor's, Diane Mallett, tentatively identified Petitioner as the driver of the roadster, and identified Houseman as the only passenger. At Tabor's home, Petitioner told his friends Terri Wilson and Mary Anne Poindexter that the roadster belonged to him. Around 3:00 p.m., Petitioner and Houseman drove the roadster to the nearby home of Viola DuCoing, where Petitioner told Justin Comer the same. Petitioner and Houseman left fifteen minutes later and returned to Tabor's home.

That evening, Petitioner and Houseman drove the roadster to the home of Terri Wilson. According to Wilson, Petitioner and Houseman brought into the house shotguns or rifles, which they claimed were theirs. Petitioner asked Wilson for sheets and blankets to cover the car.

That same evening, two of Wilson's neighbors, James Carpenter and his daughter Christie, noticed the roadster at Wilson's home. Early the next morning, September 16, 1986, James Carpenter read a newspaper story about the murders and the roadster; after determining that the car was still at the Wilson home, he called the police.

Police officers placed Wilson's home under surveillance. When an old pickup truck left the residence, police officers tried to detain it, but the driver drove away quickly. The police pursued the truck until it crashed into a fence. They arrested the two occupants: Frank Hiler (Terri Wilson's boyfriend), and Cyndi Wilson (Terri's

sister). In the cab of the pickup, police found five rifles that had been stolen from the victims' home, and were wrapped in a quilt from the victims' bed. Also in the truck was a purse belonging to Cyndi Wilson, which contained a .22-caliber bullet and a list of the guns found at the Roberts house.

At 9:30 that morning, Officer Ken Walker arrested Petitioner at Terri Wilson's home. The officer found Petitioner sitting in a living room chair. Next to the chair was a tote bag belonging to murder victim Donna Roberts. The bag contained the ignition switch from the victims' roadster, a starter pistol and pocket knife belonging to Bud Roberts, some plastic baggies, and a loaded .22-caliber High Standard revolver. Jamie Pyle identified the revolver as the pearl-handled pistol she had seen Petitioner playing with the night before the murders, and she said that Petitioner had also been holding it on the morning of his arrest. On a small table in front of the chair where Petitioner had been sitting were two handwritten notes, each containing a list of the guns stolen from the victims' home, with a price next to each gun. David Crowe, an examiner of questioned documents for the California Department of Justice, testified that Petitioner had written one of the notes and that Randal Houseman had written the other.

Houseman was also in Terri Wilson's living room when Petitioner was arrested. Beneath the couch on which Houseman was sitting was a loaded handgun that belonged to Bud Roberts. Behind Wilson's house, police found the stolen roadster, partially covered with blankets and cardboard.

Robert Springer, a supervising identification technician for the Sacramento Police Department, testified that a palm print on a wall of the entry hall of the Roberts home matched Petitioner's, as did fingerprints on the roadster, on the lists of stolen guns, on the baggies found in Donna's tote bag, and on the VCR in the garage.

Springer also found finger and palm prints made by Houseman on the entryway to the home, the baggies in the tote bag, the roadster, and the gun lists.

Criminalist Robert Garbutt testified that bullets found at the scene of the murders had rifling characteristics similar to test shots fired from the .22-caliber High Standard revolver that was found in the tote bag, the gun Petitioner had been playing with the night before the murders. Garbutt could not, however, conclusively identify the revolver as the murder weapon. He also testified that he found tiny spots of blood on the pants and shoes Petitioner was wearing at the time of his arrest, and blood on the shirt Houseman was wearing when he was arrested.

A pathologist, Dr. Thomas Amott, testified that Donna Roberts had been shot four times: in her right eye, her left thigh, the middle of her back, and at close-range behind her right ear. The gag on her mouth had been tied so tightly that it had caused tears of the frenulum, the tissue connecting the tongue to the floor of the mouth. Kathryn Roberts, like her daughter Donna, had been shot behind the right ear at close range; she also had been shot in her left wrist and twice in the back. In addition, she suffered these injuries: two head lacerations that were inflicted by a blunt object such as a crowbar or pistol butt; several stab wounds to her neck, possibly inflicted by scissors; several large bruises; defensive wounds on her hands that broke bones in a thumb and two fingers; and purplish hemorrhages in the skin of her neck that could have been caused by forcefully applied fingertips.

B. Guilt Phase-Defense Case

Petitioner, testifying in his own behalf, admitted that he participated in stealing the pink roadster, but he

denied playing any role in the murders of Donna and Kathryn Roberts.

Petitioner said that on the day the murders took place, he had gone with Randal Houseman to the victims' home to talk to Rebecca Palanuk to find out whether she was pregnant, as he had heard. (Petitioner claimed he was unaware that Palanuk had returned to Oregon and was no longer staying with the Roberts family.) At Petitioner's request, Houseman went to the door to see if Palanuk was home. Meanwhile, Petitioner, who had been warned by his probation officer to stay away from the home, waited at a nearby bus stop. After waiting for more than half an hour for Houseman to return, Petitioner walked up to the house. He saw Houseman in the garage; "a whole bunch of stuff" was in the pink roadster. While Petitioner "hot-wired" the car, Houseman entered the house. When Houseman returned, he and Petitioner drove away in the roadster.

Petitioner denied telling prosecution witnesses DuCoing, Comer, Pyle, and Poindexter that the next time he went to court he would go in a roadster, denied entering the victims' home on the day of the murders, and denied any knowledge of the killings.

On rebuttal, the prosecution introduced a tape recording of a conversation between Petitioner and Randal Houseman that took place in a holding cell at the jail after their arrest, in which Petitioner made statements contrary to his trial testimony.

C. Penalty Phase-Prosecution's Case

David Frye testified that on April 27, 1984, he telephoned the home of Teresa Smith, his former girlfriend and the mother of his son. When Petitioner answered, Frye told him to leave the house; Petitioner responded with profanities. Frye then drove to Smith's

house and walked up to the front door, where Petitioner was standing. Petitioner cocked a sawed-off shotgun, pointed it at Frye and said, "I will blow your fucking head off." Frye entered the house, telling Petitioner he was going to call the police. Petitioner left.

Larry Wilson, a visitor at the Smith home, confirmed Frye's account of this incident. He said that Petitioner had loaded the gun before Frye arrived, and that Frye, who was over six feet tall and weighed over two hundred pounds, was very angry and was ready to fight Petitioner when he arrived at the house.

Deputy Sheriff Earl Warren III, assigned to the Sacramento County jail, stated that Petitioner, on the day after his 1986 arrest, used profanity, threatened to throw soap bars at Warren and to kick him in the face, and physically resisted Warren's efforts to force him to stand facing the wall. Later that day, Petitioner said to Warren: "I am going to kill you. This is a threat. You're dead." Six months later, while Deputy Warren was searching Petitioner's belongings in his jail cell, Petitioner told Warren, "Stop going through my stuff or I will kick you in the face."

Deputy Sheriff James Cooper testified that he and Petitioner had several "verbal altercations" while Petitioner was in custody awaiting trial and that on one occasion Petitioner told him, "I am going to fuck you up." Scott French, a reserve deputy with the Sacramento County Sheriff's Department who worked at the jail, testified that on August 28, 1987, he heard Petitioner mention Deputy Cooper. Petitioner said that he would "beat his ass down" and that "his days are short." Cooper was not present at the time.

Deputy Sheriff Steve Linebarger stated that on February 15, 1988, while searching Petitioner's jail cell, he found in Petitioner's mattress a six-inch plastic knife, bound with cloth on one end and sharpened on both edges.

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

PETITIONER'S THEORETICAL CONTENTION THAT COURT-APPOINTED DEFENSE LAWYERS NECESSARILY LABOR UNDER A CONFLICT OF INTEREST WHICH CONSTRAINS THEIR EFFORTS ON BEHALF OF THEIR CLIENTS, INFRINGING UPON SIXTH AMENDMENT GUARANTEES, DOES NOT PRESENT A CONTROVERSY THAT COMPELS THE GRANT OF CERTIORARI

Petitioner first asks this Court to grant certiorari to evaluate whether court-appointed counsel necessarily gives rise to a conflict of interest. His premise, unsupported by the record below or by any cited precedent, is that payment of attorneys by the courts "necessarily inhibits such counsel from vigorously defending an protecting Petitioner's rights." Petition for Certiorari, p. 7. He asks that this Court consider by certiorari whether to dismantle the present system for court-appointed counsel and to replace it with an undefined new system.

Certiorari does not lie for determination of this abstract proposition. *Bonin v. Calderon*, 59 F.3d 815, 827 (9th Cir. 1995). Petitioner does not present an actual conflict by way of multiple representation. Instead, he sets forth a bald assertion of an abstract principle which has no support in this record, as the California Supreme Court found. *People v. Hines,* 15 Cal.4th 997, at 1029. Its

underlying assumption, *i.e.* that court-appointed counsel are "stinting" in their representation in order to assure future appointments, relies in turn upon a subordinate assumption, that a plentiful supply of capital defense counsel at the trial and appellate level compete for a scarcity of cases. This assumption is also unsupported in fact, and Petitioner does not assert otherwise.

Certiorari requires a solid showing of an active, concrete conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980); *Garcia v. Bunnell*, 33 F.3d 1193 (9th Cir. 1994), *cert. denied* 514 U.S. 1024 (1995). Sixth Amendment violations do not arise absent showings that (1) Petitioner's attorney actively represented conflicting interests; and (2) the representation actually affected the attorney's performance. The prospect of future appointment does not constitute actual conflict. *Cf. United States v. Unruh*, 855 F.2d 1363 (9th Cir. 1987), *cert. denied,* 488 U.S. 974 (1988). Accordingly, this matter does not justify certiorari.

II.

THE FACT-SPECIFIC ISSUE OF THE PROCESS BY WHICH PETITIONER ELECTED TO TESTIFY, WHICH WAS FULLY AND CORRECTLY DECIDED ON AN EXTENSIVE RECORD BY THE CALIFORNIA SUPREME COURT, DOES NOT PRESENT A QUESTION OF IMPORTANT AND WIDESPREAD APPLICATION

Petitioner also seeks certiorari based upon the detailed proceedings which led up to his decision to testify. The details of those proceedings are set forth in the California Supreme Court's opinion, *People v. Hines,* 15 Cal.4th 997, at 1030-1032, and in greater detail in respondent's state court brief at pages 114-120.

Without developing these details to the degree that the trial court and the California Court did, the following synopsis will suffice to demonstrate a fact-dependent scenario which does not raise an issue of widespread constitutional importance. The dilemma faced by Petitioner did not implicate Fifth Amendment rights.

The first trial court attention to this issue occurred on Wednesday, April 6, 1988, before the defense opening, when defense counsel requested a sidebar conference. With apologies to the court, trial counsel stated that there had been a "last minute change with regard to whether Mr. Hines would take the stand or not." Trial counsel requested about ten minutes for a private conference in another room to discuss this matter with Petitioner. RT 4857-4858.

After this conference, the court revisited a pending evidentiary issue, in the event that issue influenced Petitioner's decision to testify or not testify.

The practical effect of this ruling amounted to this: Whether or not Petitioner decided to testify, the jury would still learn about Jamie Pyle's statement to Officer Coyle about a .22-caliber cartridge found in her backpack. RT 4860-4864, 4896.

At this point, the defense counsel stated to the court that the matter had been resolved. RT 4860, 4863.

Defense counsel then made his opening statement, in which he stated that his client would testify and previewed his testimony. RT 4870-4873.

That afternoon, at Petitioner's request, an in camera hearing was held on the issue of his testifying. In camera, Petitioner complained that his counsel had already told the jury he would testify and that he did not know if he wanted to testify or not. Petitioner also said that he had not had time to decide whether he would testify or not and that his lawyer told him "[Y]ou have no choice. You have to [testify]." These last two assertions were immediately contradicted in camera by Petitioner's own lawyers. RT 4902-4906, 4909.

The court found that trial counsel's words were those of advice rather than compulsion. Further, the court offered to accommodate Petitioner if, in fact, he decided not to testify, by an explanation and preinstruction to the jury. The court also told the defense camp to confer about the matter overnight. The court then emphasized Petitioner's autonomy on this issue.[2/]

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2. The text of the court's in camera statement on the afternoon of April 6, 1988, was as follows:

> THE COURT: [E]ven if both of your attorneys said they thought it was tactically wise for you to testify, but you said, 'No thanks, I don't care to', that you have an absolute right not to do so. That's the law I'm going to operate under.

The posture of the case was thus clear, as of April 12, 1988: Petitioner expressly understood that he could, as he put it, "stand on the 5th." RT 4903. He was also told in unmistakable terms that the choice was his to make. RT 4909-4910.

In response, the trial court offered to give them additional time in which to decide whether or not Petitioner would testify, although the court and defense counsel both disputed Petitioner's statement that the

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> And conversely, if you were begging to testify, and both of them said, 'Boy, you'd be putting your neck in a noose, that's the dumbest thing you could do[,]' . . . if you insist on doing it in the face of advice of the contrary by your attorneys, some attorneys are smart enough to put it on the record to have it show that there has been such a discussion and so on, but still I think in the final analysis I suspect that your choice will govern.
>
> And I am going to permit you to exercise whichever choice you want. I am going to respectfully suggest that you and your attorneys take this evening and as much time to think about it, sleep on it, so on, as you wish and not make any final decision until tomorrow morning. I am telling you right now if you want to change your mind, I think I can as effectively as possible defuse the situation by giving the jury that instruction.
>
> I mentioned that Mr. Holmes indicated his prediction that you'd be taking the stand. On second thought you've elected not to. Then I would go right into that instruction that says you have no obligation to, and you can stand on the failure of the People to prove their case and so forth. I will make it as palatable and easy not to testify, if you wish me to, or I will give you the opportunity to testify, if you wish me to. I want you to wait until tomorrow morning to make the final decision.

RT 4910-4911.

question of whether to testify had not been previously discussed. RT 4905-4906, 4908-4911. Further, the court offered to tell the jury, in a specially set instructional session, that Petitioner was electing not to testify and that no negative inference could be drawn therefrom. RT 4907, 4911.

As of this juncture, therefore, Petitioner could decide not to testify and have the benefit of the instruction, plus the "overview" of his defense story via defense counsel. Or he could take the stand and offer explanations of the mass of incriminating evidence that had been presented against him.

At the conclusion of this hearing on Wednesday afternoon, the jury and prosecutor returned and five defense witnesses testified. RT 4911-4975. At defense counsel's request, the jury was excused until the following Monday morning. RT 4975. On the following Monday morning, proceedings were further postponed due to Petitioner's illness. RT 4977.

On Tuesday morning, April 12, 1988, the court noted that it had received a letter from Petitioner the previous day, had immediately communicated its contents to defense counsel and had sealed the letter. RT 4979.

An additional in camera hearing was then conducted on the question of whether Petitioner would testify. RT 5026-5032. Defense counsel re-emphasized their advice to Petitioner and Petitioner's vacillation on the issue the previous week. *Keenan*[3] counsel Macias described the situation as "something of an impasse." The court renewed its offer to tailor an instruction to minimize any psychological impact which Petitioner's "change of mind" might have on the jury. RT 5029. Petitioner asked how the impact of Petitioner's decision could be

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3. *People v. Keenan*, 46 Cal.3d 478 (1988).

"diffused."[4] The court responded that it could not anticipate what the jury would conclude, and restated the offer to minimize any impact of Petitioner's decision not to testify. RT 5030. Defense counsel Holmes explained the circumstances of Petitioner's vacillation before opening statement, and the court renewed its offer. RT 5031-5032. That afternoon, Petitioner took the stand. RT 5055.

The record thus discloses that Petitioner took the stand after repeated advisements that he was under no compulsion to testify. His attorneys' advice that he testify was based upon a realistic, tactical evaluation of Petitioner's options. This was clearly within the scope of counsel's professional duty.

> . . . Although counsel should not demand that the defendant follow what counsel perceives as the desirable course, counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of these decisions, so crucial to the accused's fate, the accused must make the decisions.

ABA Standards for Criminal Justice (2nd ed. 1980) 4.66 "*Allocation of Decision-making Power.*"

Further, as a matter of constitutional law, Fifth Amendment rights are not abridged where, as here, the decision to testify is a strategic choice, to maximize chances of success at trial. *United States v. Lutz*, 621 F.2d 940, 944 (9th Cir. 1980).

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in order to reduce the risk of conviction. . . . That the defendant faces such a dilemma[,] demanding a choice between

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4. Appellant's use of the word "diffused" (as transcribed) reflects use of the court's own offer to "defuse the situation." RT 4911.

> complete silence and presenting a defense[,] has never been thought an invasion of the privilege against compelled self-incrimination.

Williams v. Florida, 399 U.S. 78, 83-84 (1970); see, also, *United States v. Hearst*, 563 F.2d 1331, 1339 (9th Cir. 1977).

From the above summary of the trial record and the California Supreme Court's decision thereon, it is clear that this was a situation unique to this trial and not an issue of such widespread constitutional importance that it warrants certiorari. It involves no claim that precedent of this Court has been misapplied, and it does not implicate constitutional interests. Accordingly, certiorari should be denied on this issue as well.

III.

THE STATE SUPREME COURT'S INTERPRETATION OF STATE COURT PROCEDURES FOR MODIFYING DEATH VERDICTS, AS ADDRESSED IN A CONCURRENCE TO THE STATE SUPREME COURT'S AFFIRMANCE OF THIS DEATH VERDICT, IS NOT APPROPRIATE FOR CERTIORARI.

Petitioner's final basis for seeking certiorari concerns an interpretation of state law by the California Supreme Court on a point which has been settled California precedent for half a century. It, too, does not warrant certiorari review. It is at most, a claim of state law error which does not state a federal question.

In the California Supreme Court's affirmance of Petitioner's guilt and death verdict, one of the justices, the Honorable Stanley Mosk, concurred in the judgment, but wrote a separate concurrence concerning the procedure by which death verdicts are accorded first level review in state court. In that concurrence, he expressed the view that the provisions of California Penal Code sections 1181[5], subdivision (7) and 1260 authorize the California

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5. Section 1181 provides in relevant part:

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶ . . . [¶ 7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial,

Supreme Court to reduce a death sentence to life imprisonment without possibility of parole.

Seizing upon this concurrence, Petitioner propounds it as a third basis for certiorari. Petition for Certiorari, at 18-20. This issue does not justify discretionary review by certiorari, because it involves no federal question and was not adjudicated before the California Supreme Court in federal constitutional terms. It is, instead, a question of longstanding state court interpretation of state law, a matter on which certiorari would be imprudent as a possible prelude to an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

For almost half a century, the California statutes concerning review of death verdicts have been interpreted as authorizing the trial court to conduct the review and, where appropriate, order the modification of the verdict. Section 190.4, subdivision (e)[6], which has been a fixture

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and this power shall extend to any court to which the case may be appealed; . . .

Also section 1200 states:

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any and all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

6. Section 190.4 subdivision (e) provides in pertinent part:

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section [1181]. In ruling on the

of California's death penalty law since 1977, specifically directs the trial court to review such a verdict automatically, whether or not sought by a capital defendant.

Even before this procedure for the trial court's automatic review of a death verdict was in place, moreover, the state's law had long been construed by the state's highest court as authorizing the trial court, but not the California Supreme Court, to reduce a death verdict. In 1970, for example, this Court noted the absence of such power in the California Supreme Court when summarizing California's post-trial procedures in death penalty cases. *McGautha v. California*, 402 U.S. 183, 191, n.5 (1971). The long line of California Supreme Court precedents which view the division of responsibilities in this way extends toward the middle of the century. A review of the cases collected in *People v. Howk*, 56 Cal.2d 687, 700-701, (1961) for example, demonstrates that this is a question of state law interpretation which has, with occasional disagreement by appellate concurrences, remained a stable view. By this interpretation of state law, the California Supreme Court analyzes the trial court's review of modification motions, but it does not substitute its judgment for that of the judge before whom the case was tried.

Against this half century of settled law, Petitioner mounts a belated due process claim. Petitioner characterizes the general provisions of sections 1181,

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> application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. . . .

subdivision (7) and 1260 as a "procedural entitlement" to which due process rights are affixed. Petition for Certiorari, at 19. Since Petitioner did not characterize his claim as a due process "entitlement" before the California Supreme Court, and the California Supreme Court addressed the issue on a rationale of state court precedent, the federal claim, if any, was not preserved. Further, since the state law at issue is one of discretionary power to reduce a death verdict, the interest cannot be an assertable liberty interest for purposes of due process analysis. Finally, the issue is, at most, a theoretical one, in view of Justice Mosk's express conclusion, in the final paragraph of the concurrence, that he would not exercise purported power to reduce the death sentence in Petitioner's case. 15 Cal.4th at 1084.[7] Petitioner thus cannot show prejudice even if the other obstacles to certiorari were overcome.

The post-trial division of responsibilities between the trial court and the California Supreme Court is thus a question of state court interpretation of state law which has given rise to a stable body of state law which offends no federal constitutional guarantees. Certiorari to review this issue is thus not warranted.

Respondent is also compelled to correct a misleading impression in Petitioner's argument on this basis. Citing to *Tuilaepa v. California*, 512 U.S. 967, 129 L.Ed.750, 767-774, 114 S.Ct. 2630 (1994) (diss. opinion of Blackmun, J.), Petitioner characterizes California's capital charging and sentencing system, as "unable to separate defendants deserving of death from those are not . . . ." The *Tuilaepa* holding is squarely to the contrary to

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7. "I would not exercise our power in this cause. Viewing the evidence in the light most favorable to the punishment imposed, I cannot determine that the jury's implicit conclusion that aggravation outweighs mitigation is contrary to law or evidence." 15 Cal.4th at 1084.

Petitioner's argument here, and citation to the dissent is misleading.

CONCLUSION

Accordingly, for the reasons stated, Respondent respectfully requests that the petition for writ of certiorari be denied.

Dated: December 18, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General

SUSAN J. ORTON, Assistant
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

No. 97-832

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY DALE HINES,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

DECLARATION OF SERVICE BY MAIL
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
SUSAN J. ORTON, Assistant
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5279
Counsel for Respondent

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Martin H. Kresse (3 copies)
Steuart Street Tower
One Market
San Francisco, CA 94105

Each said envelope was then, on December 18, 1997, sealed and deposited in accordance with the mailroom procedures of this office in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 1997, at Sacramento, California.

SUSAN J. ORTON
Deputy Attorney General